Menteri Dalam Negeri & Ors v Gopal a/l R Subramaniam

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–153–06 OF 2016 (R)
RAUS SHARIF CHIEF JUSTICE, SURIYADI, RAMLY ALI, PRASAD ABRAHAM AND JEFFREY TAN FCJJ
1 JUNE 2017

Criminal Law — Prevention of Crime Act 1959 ('the POCA') — Section 10(2) — Whether 'forthwith' in s 10(2) meant 'as soon as reasonably practicable' and not 'then and there' or 'immediate' — Whether in all applications for habeas corpus turning on meaning of 'forthwith' in s 10(2) of the POCA court must see if any delay in service of copy of inquiry officer's finding on detainee had been sufficiently explained before deciding whether officer having custody of detainee had effected service as soon as practicable without unreasonable delay

The instant appeal turned on the meaning to be given to the word 'forthwith' in s 10(2) of the Prevention of Crime Act 1959 ('the POCA'). The respondent was arrested under s 3(1) of the POCA and then remanded to enable the inquiry officer ('IO') to conduct an investigation. Based on the IO's investigation and findings, the Prevention of Crime Board, constituted under the POCA, ordered the respondent to be detained for two years at the fourth appellant's centre. The police inspector who had custody of the respondent at the material time had, on the same day he received a copy of the IO's finding, served the respondent with a copy of the same. The issue in this appeal was whether that service was done 'forthwith' as prescribed by s 10(2) of the POCA. The appellants argued that the word 'forthwith' had to be given the meaning 'as soon as reasonably practicable'. The respondent submitted that it should be construed to mean 'immediately'. The High Court in the instant case held that 'forthwith' in s 10(2) should be taken to mean 'immediate'.

Held, allowing the appeal:

(1) Having considered all relevant cases and authorities on the subject, this court would hold that the word 'forthwith' in s 10(2) of the POCA should be construed as 'as soon as reasonably practicable' and not as 'then and there' or 'immediate'. On the facts of the instant appeal, there was no infringement of s 10(2) of the POCA as the inspector who had custody of the respondent had 'as soon as reasonably practicable' duly served the inquiry officer's report on the respondent on 19 August 2015 at 1.55pm after having received the inquiry findings the same day. The period

between the time the inspector received the report and his serving it on the respondent was well within the definition of 'forthwith' (see paras 16 & 18).

(2) In all applications for habeas corpus grounded on s 10(2) of the POCA revolving around the word 'forthwith', the court should approach such applications in the following manner: (a) if the facts of the case showed there was a delay in the officer having custody of the applicant in serving a copy of the finding of the inquiry officer on the applicant, the court must look at the respondent's affidavit to ascertain whether the respondent had explained the delay sufficiently; and (b) the court must then consider whether, on the circumstances of the case and the explanation for the delay, the officer having custody had acted without unreasonable delay and as soon as practicable (see para 17).

[Bahasa Malaysia summary

Rayuan ini adalah berhubung maksud yang diberikan kepada perkataan 'forthwith' dalam s 10(2) Akta Pencegahan Jenayah 1959 ('APJ'). Responden telah ditangkap di bawah s 3(1) APJ dan kemudian ditahan bagi membolehkan pegawai siasatan ('PS') membuat siasatan. Berdasarkan siasatan dan penemuan PS, Lembaga Pencegahan Jenayah, yang ditubuhkan di bawah APJ, telah memerintahkan responden ditahan selama dua tahun di pusat perayu keempat. Inspektor polis yang menjaga responden pada masa matan telah, pada hari yang sama dia menerima salinan penemuan PS, menyampaikan responden satu salinan yang sama. Isu dalam rayuan ini adalah sama ada perkhidmatan tersebut dilakukan 'forthwith' sepertimana dinyatakan oleh s 10(2) APJ. Perayu-perayu berhujah bahawa perkataan 'forthwith' perlu diberikan maksud 'as soon as reasonably practicable'. Responden berhujah bahawa ia hendaklah ditafsirkan untuk bermaksud 'immediately'. Mahkamah Tinggi dalam kes ini memutuskan bahawa 'forthwith' dalam s 10(2) hendaklah membawa maksud 'immediate'.

Diputuskan, membenarkan rayuan:

(1) Setelah mempertimbangkan kesemua kes dan autoriti yang relevan berhubung hal perkara tersebut, mahkamah ini memutuskan bahawa perkataan 'forthwith' dalam s 10(2) APJ hendaklah ditafsirkan sebagai 'as soon as reasonably practicable' dan bukan sebagai 'then and there' atau 'immediate'. Berdasarkan fakta rayuan ini, tidak ada pelanggaran s 10(2) APJ kerana inspektor yang mempunyai jagaan ke atas responden telahpun 'as soon as reasonably practicable' menyampaikan laporan pegawai siasatan ke atas responden pada 19 Ogos 2015 pukul 1.55 petang setelah menerima penemuan siasatan pada hari yang sama. Tempoh antara masa inspektor itu menerima laporan itu dan penyampaiannya ke atas responden adalah dalam takrif 'forthwith' (lihat perenggan 16 & 18).

(2) Dalam semua permohonan untuk habeas corpus yang berasaskan s 10(2) APJ berkisarkan perkataan 'forthwith', mahkamah hendaklah mengendalikan permohonan sedemikian dengan cara berikut: (a) jika fakta kes menunjukkan terdapat kelewatan pegawai yang mempunyai jagaan pemohon dalam menyampaikan sesalinan penemuan pegawai siasatan itu ke atas pemohon, mahkamah harus melihat kepada afidavit responden untuk menentukan sama ada responden telah menjelaskan kelewatan itu dengan secukupnya; dan (b) mahkamah mesti kemudian mempertimbangkan sama ada, mengikut keadaan kes dan penjelasan kerana kelewatan itu, pegawai yang mempunyai jagaan itu telah bertindak tanpa kelewatan yang tidak munasabah dan secepat mungkin (lihat perengan 17).]

Cases referred to

Basant Raj v State of Rajasthan 1994 Cri LJ 2137, HC (refd)
Hanizam Hassan v Pengerusi Lembaga Pencegahan Jenayah & Yang Lain [2015] 5 CLJ 226, HC (refd)
Keshav Nilkanth Joglekar v The Commissioner Of Police AIR 1957 SC 28, SC (refd)
Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Liau Nyun Fui [1991] 1 MLJ 350; [1991] 1 CLJ Rep 458, SC (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 54(2)
Prevention of Crime Act 1959 ss 3(1), 4(1)(a), (2)(a), 9, 10, 10(2), 19A(1)

Mohammad Al-Saifi bin Hj Hashim (Muhammad bin Sinti with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
Naizatul Zamrina bt Hj Karizaman (KL Chee & Co) for the respondent.

Prasad Abraham FCJ (delivering judgment of the court):

INTRODUCTION

[1] We heard and allowed this appeal on 12 April 2017. In light of the fact that our decision involved an interpretation of s 10(2) of the Prevention of Crime Act 1959 ('the POCA') and that there are several pending appeals revolving around the said section, when allowing the appeal we intimated to counsel that grounds of judgment would follow and we now append our said grounds.

MATERIAL FACTS

[2] The material facts of this instant case are clearly elucidated in the grounds of judgment of the learned High Court judge.

[3] Essentially, on 5 July 2015, the respondent was arrested under s 3(1) of the POCA. The respondent was then remanded pursuant to ss 4(1)(a) and 4(2)(a) of the POCA so as to enable the inquiry officer ('Nor Jamilah Shuhadah bt Tohet') to conduct an investigation pursuant to s 9 of the POCA.

[4] The inquiry officer then prepared a report from the findings of her inquiry as required under s 10 of the POCA. The inquiry officer did all that was needed until the commencement of the board which sat on 3 September 2015.

[5] The respondent was subsequently detained for a period of two years from 3 September 2015 at 'Pusat Pemulihan Khas' Bentong, Pahang on a detention order ('the said order') issued by the board pursuant to s 19A(1) of the POCA.

[6] Insp Ismantie, the officer having custody of the respondent, on 19 August 2015 received the report from the inquiry officer. On the same day (19 August 2015) at 1.55pm the said inspector served a copy of the report to the respondent pursuant to s 10(2) of the POCA. The issue in this appeal pertains to the time-frame between the time the said Inspector received the report to the time the said inspector served it to the respondent and whether it could be construed as 'forthwith'. Section 10(2) and the requirement of service of the 'forthwith' applies from the service and the inquiry report by the officer having custody of the respondent, on the respondent and the consideration of the court should be confined to that.

SUBSTANTIVE ARGUMENTS

[7] Learned counsel for the appellants and respondent pivoted their argument on the interpretation of s 10(2) of the POCA and the meaning of the word 'forthwith'. The appellants in this case submitted that the word 'forthwith' must be read as 'as soon as reasonably practicable'. Counsel for the respondent argued that the meaning to be ascribed to the word 'forthwith' as 'immediately'.

[8] The High Court, following the decision of another High Court in *Hanizam Hassan v Pengerusi Lembaga Pencegahan Jenayah & Yang Lain* [2015] 5 CLJ 226, which also dealt with an application for habeas corpus based on s 10(2) of the POCA, took the meaning of 'forthwith' to be read as 'immediate'.

[9] It is to be observed that under s 10(2) of the POCA, the court is analysing the length of time that the officer having custody of the applicant takes to serve a copy of the finding of the inquiry officer on the respondent.

A THE LAW

[10] The starting point in considering the question posed before us would be the Interpretation Acts 1948 and 1967 ('Act 388') particularly, s 54(2) which we now set out:

B

54(1) In computing time for the purposes of any written law —

(a) ...

(b) ...

C (c) ...

(d) ...

(2) Where no time is prescribed within which anything shall be done, that thing shall be done *with all convenient speed and as often as the prescribed occasion* arises. (Emphasis added.)

D

[11] Section 10(2) of the POCA does not contain a specified time for service, save to state that where no time is prescribed it shall be done with all convenient speed and as often as the prescribed occasion arises. For a case on point we refer E to the Supreme Court decision of *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Liau Nyun Fui* [1991] 1 MLJ 350; [1991] 1 CLJ Rep 458 where Abdul Hamid Omar LP (as he then was) said:

It can immediately be observed that there is no time frame given in s 3(i) of the Enactment. Since no time is prescribed then according to s 38 of the Interpretation F and General Clauses Ordinance 1948 (similar provision also found in s 54(2) of the Interpretation Act 1967), then anything which shall be done shall be done with all convenient speed.

There is however a time frame given by s 3(ii) of the Enactment imposed by the words 'as soon as may be' after action has been taken under sub-s (i) appearing in G that subsection. *The words 'as soon as may be' means as nearly as may be reasonable in the circumstances of the case.* See also *Aminah v Superintendent of Prison, Pengkalan Chepa* [1968] 1 MLJ 92.

Whoever caused the delay must explain the delay; and it is for the court to decide whether the delay is reasonable under the circumstances. (Emphasis added.)

H Turning to the present case, it seems clear that a time frame is not prescribed under s 2(ii) of the Enactment and the Timbalan Menteri cannot therefore be said to be imposed with an obligation to make a restriction order within a specified time. The word 'thereafter' used in sub-s (ii) of the Enactment clearly connotes that the Timbalan Menteri may make a restriction order 'thereafter', that is, some time after I making the order of arrest and detention, after such further enquiry he may deem necessary.

Two distinct situations would therefore arise where a restriction order is issued and that is:

(1) after a further enquiry (if further enquiry is deemed necessary):

(2) after no further enquiry is deemed necessary.

In the light of the judgment in *Phua Hing Lei*'s case the position in law seems to be that when no time frame is prescribed then anything that shall be done under s 2(ii) shall be done with all convenient speed. Accordingly in respect of situation (1), the further enquiry and the issue of the restriction order shall be effected with all convenient speed. What constitutes convenient speed would depend on the circumstances of each case. In respect of situation (2), where the Timbalan Menteri does not deem it necessary for any further enquiry he ought to proceed thereafter, that is, after the detention, to make the restriction order with all convenient speed.

The correct test to be applied therefore is not on the basis of unreasonable delay but convenient speed. The learned judicial commissioner determined the question before him on the basis of unreasonable delay. This was not a proper approach. The question that was before him was whether the Timbalan Menteri in the particular circumstances of that case had acted with all convenient speed in making the restriction order. Strictly it was for the respondent to show that the Timbalan Menteri had not so acted and not for the Timbalan Menteri to provide an explanation acceptable to the court. (Emphasis added.)

[12] Turning however to the definition of the word 'forthwith' we refer to *Words, Phrases and Maxims (Legally and Judicially Defined)* by Anandan Krishnan (LexisNexis 2008) citing Maxwell in *Interpretation of Statutes* (11th Ed) at p 341, and we quote:

When a statute require that something shall be done forthwith or immediately or even instantly it should probably be understood as allowing a reasonable time for doing it. Expression forthwith should be construed to mean within reasonable period. (*Basant Raj v State of Rajasthan* 1994 Cr LJ 2137 at p 2140 (Raj); see also *Bouviet's Law Dictionary*, unabridged *Rawle*'s 3rd Ed Vol I at p 1289.

JD

The word 'forthwith' has been interpreted to mean as soon as possible; without any delay. If there is some delay which is reasonably explained, there is no violation of the mandatory requirement of the law. Thus, where it has been explained that as many as seven detention orders were made by the district magistrate on 23 August 1973, reports have to be typed in all those cases and they were typed on 24 and 25 August and 26 August was Sunday and therefore the report could not be sent earlier than 23rd the report was held to have been sent forthwith, as the apparent delay of three days have been satisfactorily explained. (*Gopal Mondal v State of WB AIR* 1975 SC 1807 (1807); (1975) 1 SCWR 550; 1975 Cr LJ 1554). The word forthwith means as soon as reasonably possible. (*Kamlakar Kurrey v SDO, Raipur* 1982 MPWN 321(DB)). (Emphasis added.)

Lord Hardwicke observed in *Rex v Francis* [1938] 4 All ER 570 that the word immediately and the word forthwith bear the same meaning. Lord Hardwicke further laid down: The word is never understood either to exclude mesne acts or time, but only means with convenient speed ... In *Queen v The Justice of Berkshire* (1879) 4 QBD 469, Cockburn CJ said: The words forthwith and immediately have the same meaning. They are stronger than the expression within a reasonable time and imply prompt, vigorous action, without any delay and whether, there has been

such action is a question of fact having regard to the circumstances of the particular case. *Re Muscovitch* [1939] 1 All ER 135, Sir Wilfred Greene MR says:

> Word forthwith which is peremptory and admits of no interval of time ... In the case of *Re Muscovitch* [1938] 4 All ER 570, Farwell J said:
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> The word forthwith means that the copy of the notice shall be sent immediately upon the appeal being entered or at any rate within every short time. In *K N Joglekar v Commissioner of Police AIR* 1957 SC 28, Venkatarama Ayyar J, speaking for the court, explained thus: On these authorities, it may be taken an act which is to be done forthwith must be held to have been so done. When it is done with all reasonable despatch and without avoidable delay. (*Mahender Singh v State of Rajasthan* 1972 WLN 70).
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> *According to Thommen J, the expression forthwith has to be understood in the context of the statute. Where the statute prescribes the payment of money and the accrual of interest thereon at certain points of time the expression forthwith must necessarily be understood to be immediate or instantaneous, so as to avoid any ambiguity or uncertainty. The legislature in s 73(2A) of the Companies Act 1956, intended the expression forthwith to refer to a particular day on which the liability to repay the principal amount arose and that is the day from which the period of eight days has to be computed and on the expiry of that period, interest begins to accrue. According to Mohan J, it cannot be said that forthwith means eo instanti.* (*Raymond Synthetics Ltd v Union of India* (1992) 2 SCC 255 at pp 271–292; AIR 1992 SC 847; (1992) 73 Com Cas 762. (Emphasis added.)
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> In its ordinary signification, immediately (*Whitehurst v North Carolina Mut Ins Co* 78 Am Dec 246) as soon as by reasonable exertion, confined to the object, it may be accomplished (*Anderson v Goff* 1 Am St Rep 34); as soon as is reasonably convenient (*Hudson v Hill,* 43 LJCP 273 at p 279); as soon as reasonably can be; as soon as reasonably possible; as soon as the thing may be done by reasonable exertion confined to that object (*Bouvier L Dict*), as soon as with reasonable dispatch in the ordinary course of business, it can be done, by and by (*Cooper Dict*); directly (*Webster*) at the same point of time; at one and the same time; simultaneously at once; now as from this moment; henceforth; in the reasonable course of the orderly conduct of the business of an office, presently; with all reasonable diligence and dispatch; with diligence. (*Ciffey v New York Cent Ins Co* 53 Am St Rep 202); with due diligence with reasonable diligence (*Central City Ins Co v Oates* 11 Am St Rep 67) without unreasonable delay; without unreasonable or unnecessary delay (*Munz v Standard L etc Ins Co* 99 Am St Rep 830); without unnecessary procrastination and delay. Such is the import of the term, but it varies with any particular case and will imply a longer or shorter period, according to the nature of the thing to be done.

The text also contains several commentaries on the word 'forthwith' and instances of which are set out below at p 427:

> *The word 'forthwith' means 'without any delay or loss of time' and a word which does not imply delay but quite the reverse.*
>
> (Emphasis added.)
>
> See *Roberts v Brett* 11 ER 1363 which imply adopted as to the meaning of

'forthwith' in *Hudson v Hill* (1874) 43 LJCP 277. *Nam Bee Rubber Estate Sdn Bhd v Syarikat Tanaman Perak Bhd* [1986] 1 MLJ 29 at p 34 per Hashim Yeop A Sani SCJ.

Author

'Forthwith' means without unreasonable delay. (Keshav*Nilkantha v Commissioner of Police* AIR 1957 SC 28). The word 'Forthwith' cannot mean 'as soon as may be'. (*Vaidhya Dev Verma v District Magistrate* AIR 1969 SC 323). The word 'Forthwith' means immediately. (*Awas Samasya Niwaran Sanstha v State of Madhya Pradesh* AIR 1995 Madhya Pradesh 69). *The word 'Forthwith' should not be construed as to mean 'then and there', but means 'within reasonable time'* (*Basant Raj v State* 1994 WLN 92).

Author

The word 'forthwith' means immediately, straightaway, as soon as possible, *as soon as reasonable possible* or within a specific time limit.

(Emphasis added.)

[13] We also refer to the *Text Judicial Dictionary (A Complete Law Lexicon)* by KJ Aiyar (18th Ed) Butterworths at p 427, and we quote:

Explaining this word, Maxwell in *Interpretation of Statutes*, 11th Ed, p 341 observes:

> When a statute require that something shall be done forthwith or immediately or even instantly it should probably be understood as allowing a reasonable time for doing it.
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> Expression forthwith should be construed to mean within reasonable period. (*Basant Raj v State of Rajasthan* 1994 Cr LJ 2137 at 2140 (Raj); see also *Bouviet's Law Dictionary*, unabridged Rawle's 3rd Ed Vol I at 1289.
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> The word 'forthwith' in s 3(3) and the phrase 'as soon as may be' as used in s 3(4), Preventive Detention Act 1950, were considered in *Keshav Nilkanth Joglekar v The Commissioner Of Police* 1957 SC 28 (32); [1956] SCR 653, (658, 669) and it was observed:
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> > *... Forthwith ... cannot mean the same thing as 'as soon as may be'...* and that the former is more preemptory than the latter. The difference between the two expressions lies ... in this that while under s 7, the time that is allowed to the authority to send the communication to the detenue is what is reasonably convenient, under s 3(3) what is allowed is only the period during which he could not, without any fault of his own, send the report. (*Bidya Deb v Dist Magistrate, Tripura AIR* 1969 SC 323 (325); 1969 Cr LJ 525; (1969) 1 SCA 189; (1969) 1 SCJ 900; (1968) 2 Um NP 527). (Emphasis added.)

The term 'forthwith' has been defined in Wharton's Law Lexicon, 14th Ed, as below:

When a defendant is ordered to plead forthwith, he must plead within 24 hours. When a statute or rule court requires an act to be done 'forthwith' it means that the act is to be done within a reasonable time having regard to the object of the

provisions and the circumstances of the case. (*Tripathi Sansnath v Tripathi Bhagwatnath AIR* 1966 All 615 (616); 1964 ALJ 1085).

[14] We also refer to the Supreme Court of India's decision of *Keshav Nilkanth Joglekar v The Commissioner Of Police* AIR 1957 SC 28 on where V Aiyyar J:

> that the word 'forthwith' in s 3(3) of the Preventive Detention Act 1950, has not a fixed and an absolute meaning and it must be construed with reference to the object of the section and the circumstances of the case. It cannot mean the same thing as 'as soon as may be' in s 7 of the Act and the former is more peremptory than the latter. The difference between the two expressions lies in this that while under s 7 the time that is allowed to the authority to send the communication to the detenue is what is reasonably convenient, under s 3(3) what is allowed is only the period during which he could not, without any fault of his own, send the report.
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> *An act which is to be done forthwith must be held to have been so done when it is done with all reasonable dispatch and without avoidable delay*. (Emphasis added.)
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> *The Queen v The Justices of Berkshire* [1878–79] 4 QBD 469, *Hudson and others v Hill and others* [1874] 43 LJ CP 273, and *Beg v Price* 8 Moore PC 203, relied on.

[15] *Basant Raj v State of Rajasthan* 1994 Cri LJ 2137, the Rajasthan High Court had cause to consider the definition of the word 'forthwith' in the context of a statute that used the particular phrase and RS Verma J at para 20, in this manner:

> 20. *In my opinion the term 'forthwith' in the context of the Rules should not be construed as to mean 'then and there'. Expression 'forthwith' should be construed to mean 'within reasonable period'.* There may be myriad situations where a person having licence for a weapon may be carrying the weapon with him on his person and he may not be able to produce it immediately on being asked to produce the same. I may illustrate the situation by citing a hypothetical case. Mr Tom holds a valid licence for a gun. He is sitting in his house and the gun is lying by his side. The licence is kept locked in an almiraha. The key of which is with his wife and the wife is out of station. Mr Tom is attacked by unknown intruders who unlawfully enter his house. He fires at them and chases them at a distance from his house. The police comes in the meanwhile and the intruders have made good their escape and Mr Tom is arrested by the police with a gun in his possession but without being a licence on his person. He is asked to produce the licence on demand and he explains the situation but the officer insists upon immediate production and on Mr Tom's failure to do so, arrests him. Could it be said that he has committed an offence because he did not carry the licence of the arm with him on his person. In my opinion a categorical answer to the question would be No, No and an emphatic No. This is only one illustration and illustrations, may be multiplied wherein a person holding a valid licence for a gun may not be in a position to carry the same with him on his person but may be in a position to produce it before a Competent Officer within a reasonable period on being asked to do so. In the present case the licence was produced before the competent Magistrate, just the next day without wasting any time. It may be stated that the petitioner was under arrest and had been produced before the Magistrate on

the next day. In these circumstances, I am of the view that there was no contravention of Rules 62 of the Arms Act so as to make it punishable within a meaning of Section 30 of the Arms Act. Thus, I find that the learned Magistrate had no material whatsoever, to frame charge under Rule 62 of the Arms Rules read with Section 30 of the Arms Act against the petitioner. (Emphasis added.)

[16] Having considered all the cases and the comments of the learned authors referred to aforesaid, we would hold that the word 'forthwith' in s 10(2) of the POCA is to be construed as 'as soon as reasonably practicable' having considered all the facts of the case and not 'then and there' or 'immediate'.

[17] We would direct that in all applications for habeas corpus grounded on s 10(2) of the POCA, revolving around the word 'forthwith' the court should approach the said applications in the following manner viz:

(a) if the facts of the case show that there was a delay in the officer having custody of the applicant in serving a copy of the finding of the inquiry officer on that person, the court must then look at the affidavit of the respondent to ascertain whether the respondent has explained the delay sufficiently; and

(b) the court then must consider in the circumstances of the case and the explanation for the delay, whether the officer acted without unreasonable delay and as soon as practicable.

[18] On the facts of this instant appeal, we find that there was no infringement of the requirements of s 10(2) of the POCA as the inspector having custody of the respondent had 'as soon as reasonably practicable' duly served the report on the respondent on 19 August 2015 at 1.55pm, after having received the inquiry findings on the same day. The period between the inspector receiving the report and serving it on the respondent was to our mind well within the definition of 'forthwith'. Therefore under those circumstances we allowed the appeal and made the necessary orders.

Appeal allowed.

Reported by Ashok Kumar